

Dated: June 27, 1985.

J. Craig Potter,

Acting Assistant Secretary for Fish and Wildlife and Parks.

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50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Endangered and Threatened Status for Five Florida Pine Rockland Plants

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: The Service finds four plants to be endangered: *Euphorbia deltoidea* ssp. *deltoidea* (spurge), *Galactia smallii* (Small's milkpea), *Polygala smallii* (tiny polygala), and *Amorpha crenulata* (crenulate lead-plant). The Service finds one plant, *Euphorbia garberi* (Garber's spurge), to be a threatened species. The four endangered species are restricted to pine rockland habitats in Dade County, Florida. They are endangered by the continuing destruction of pine rocklands for residential and commercial purposes. *Euphorbia garberi* formerly occurred widely in Dade and Monroe Counties, Florida, at the edges of pinelands and hammocks, and in coastal areas. Its range has been reduced by commercial and residential development to four sites in Everglades National Park and one site in the Florida Keys. Critical habitat has not been designated for any of these species. This action provides the protection of the Endangered Species Act to the five plant species.

DATE: The effective date of this rule is August 19, 1985.

ADDRESS: The complete file for this rule is available for inspection, by appointment, during normal business hours at the Endangered Species Field Station, U.S. Fish and Wildlife Service, 2747 Art Museum Drive, Jacksonville, Florida 32207.

FOR FURTHER INFORMATION CONTACT: Mr. David J. Wesley, Endangered Species Field Supervisor, at the above address (904/791-2580 or FTS 946-2580).

SUPPLEMENTARY INFORMATION:

Background

Euphorbia deltoidea was originally described by Engelmann, and published in Chapman (1883). Small (1903) transferred the species to the genus *Chamaesyce*. For the sake of consistency with the Service's previous

treatment of the segregate genus *Chamaesyce*, the species affected by this rule are referred to the genus *Euphorbia*. This agrees with the nomenclature used in the Service's December 15, 1980, plant notice of review (45 FR 82480). Small (1903, 1927) later described *Chamaesyce serpyllum* and *Chamaesyce adhaerens* as species distinct from *Chamaesyce deltoidea*. Burch (1966) considered *Euphorbia deltoidea* to have two subspecies, *deltoidea* and *serpyllum*, the former including the varieties *deltoidea* and *adhaerens*. Herndon, however, believes that *deltoidea*, *adhaerens*, and *serpyllum* should be considered distinct species (Herndon, Florida International University, pers. comm., 1984). This final rule applies to the taxa *deltoidea* and *adhaerens*, which are restricted to Dade County, Florida. *Euphorbia deltoidea* subspecies *serpyllum* is restricted to Big Pine Key, Monroe County, Florida, and is a candidate for Federal listing. There is no known overlap in range among these three taxa. *Euphorbia deltoidea* ssp. *deltoidea* variety *deltoidea* occurs in the Coral Gables-South Miami-Perrine area, while variety *adhaerens* occurs in the Homestead-Goulds area. These two varieties are both covered by the listing of the subspecies *Euphorbia deltoidea* ssp. *deltoidea*.

Euphorbia deltoidea is a herbaceous, prostrate to barely ascending plant forming small mats to a few decimeters in diameter. The thin, wiry stems extend from a central woody taproot. Leaves are deltoid to ovate in shape, opposite, and up to 5 millimeters (0.2 inch) long. The flowers are unisexual; male and female flowers are arranged in a cuplike structure (cyathium). The 3-seeded fruits are 1-2 millimeters (0.04-0.08 inch) wide; seeds measure about 1 millimeter (0.04 inch) wide. The density and distribution of hairs on the stems, leaves, and capsules distinguish varieties *deltoidea* and *adhaerens*. Variety *deltoidea* is essentially hairless; *adhaerens* is fairly hairy.

Galactia smallii was described as *Galactia prostrata* by Small (1933). Herndon (1981) published H.J. Roger's finding that this specific name was preoccupied by another species of *Galactia*. He also published Hollis' suggestion of the new specific name *smallii*, and clarified the characters separating this species from the related *Galactia pinetorum*. *Galactia smallii* is a small vine with compound leaves, usually with 3 elliptic leaflets 1.5-3 centimeters (0.6-1.2 inches) long. The pinkish flowers have a calyx 8-9 millimeters (0.34 inch) long and a standard petal 15-17 millimeters (0.59-0.67 inch) long. This species is currently

known from only two sites near Homestead.

Polygala smallii was originally described by Small (1905) as *Polygala arenicola*. Smith and Ward (1976), realizing that the specific name *arenicola* was preoccupied in the genus *Polygala*, proposed a new name, *Polygala smallii*. The plant was originally known from pine rocklands in Broward and Dade Counties, Florida, but attempts to locate this species in 1979 (Austin et al., 1980b) found all historic populations extirpated. The species is now known only from two sites in Dade County. *Polygala smallii* is an erect biennial herb with short, branched or unbranched stems. Leaves are 12-50 millimeters (0.47-1.97 inches) long, crowded, and oblanceolate to linear-lanceolate, and often form a basal rosette. The small yellow-green flowers are clustered at the ends of stems. The oblong seeds are 1.9-2.3 millimeters (0.08-0.09 inch) long.

Amorpha crenulata was described by Rydberg (1919) based on material from near Coconut Grove, Dade County, Florida. Wilbur (1975) confirmed the taxonomic validity of this species. The plant is presently restricted to a few sites in the South Miami area (Herndon, 1984a). *Amorpha crenulata* is a shrub to 1.5 meters (4.92 feet) in height. The compound leaves bear 25-33 leaflets. The flowers bear a single petal (the standard) 6 millimeters (0.24 inch) long and are arranged in loosely clustered racemes 9-20 centimeters (3.5-7.9 inches) long. The seed pod is 6-7 millimeters (0.24-0.27 inch) long and is conspicuously glandular.

Pine rockland plants formerly were more widely distributed along the south Florida limestone ridge, an area about 105 kilometers (65 miles) long, extending more or less continuously from southeastern Broward County to Long Pine Key in Everglades National Park. The ridge reaches 3-5 meters (10-16 feet) in elevation and provides a markedly different habitat for plants and animals than the marshes and wet prairies that dominate the surrounding areas. The substrate consists of porous limestone known as Miami oolite. Soils are poorly developed, consisting mainly of a thin layer of sand. Erosion of the limestone results in frequent solution holes and jagged surface features. Many plants are rooted in crevices in the limestone. The predominant canopy vegetation on the ridge is southern slash pine (*Pinus elliotii* var. *densa*). An understory of saw palmetto (*Serenoa repens*), silver palm (*Coccothrinax argentata*), poisonwood (*Metopium toxiferum*), rough velvetseed (*Guetarda*

scabra), and wax myrtle (*Myrica cerifera*) is typical. Large numbers of endemic pine rockland plants are present in the understory. Lack of fire results in succession to tropical hardwood hammock vegetation, characterized by oaks (*Quercus virginiana*), gumbo-limbo (*Bursera simaruba*), strangler fig (*Ficus aurea*), poisonwood (*Metopium toxiferum*), wild tamarind (*Lysiloma latisiliqua*), and other species. Burning at 3 to 10-year intervals may be necessary to maintain the pine rockland community; without fire the community may develop into rockland hammock in about 25 years (Duever, 1984).

The pine rocklands have been extensively developed for residential, commercial and agricultural purposes. Shaw (1975) estimated that the historic area of pinelands and hammocks in Dade County, exclusive of Everglades National Park, was about 152,000 acres. In 1975, these forests were estimated to have been reduced to 8,149 acres; 7,370 acres were pinelands. Only 5,268 acres of pinelands were of sufficient size to be considered viable. In 1978, these 5,268 acres of viable pineland had decreased to 4,558 acres (Anonymous, 1978). Only 1,710 acres of pineland remained in good condition; the remainder suffered from lack of burning and/or invasion of exotic plants. The Dade County Department of Resources Management is currently updating the forest survey, since the pinelands have continued to decline rapidly since 1978. Summaries of the unique botanical features of the Miami rock ridge pineland and the threats facing the remnants of this habitat type were recently provided by Herndon (1984b) and Duever (1984). *Linum carteri* var. *carteri* (Carter's flax), an endemic to Dade County pinelands, is a candidate species for Federal listing but could not be located in a 1980 search and may now be extinct (Austin *et al.*, 1980a).

Euphorbia garberi was originally described by Engelm. in 1883. Small (1903) transferred the species to the genus *Chamaesyce*. *Euphorbia garberi* is a prostrate herb with hairy stems, ovate leaves 4-9 millimeters (0.16-0.35 inch) long, and conspicuous flowers. The species formerly occurred in Dade and Monroe Counties, Florida, from the Miami area to the lower Florida Keys. Researchers conducted a status survey and were unable to locate this species over much of the historic range (Austin *et al.*, 1980a). The only known remaining populations occur at four sites in Everglades National Park, one in Dade County and three in Monroe County, Florida, and one site on Big Pine Key,

Monroe County, Florida. *Euphorbia garberi* occurs in transitional areas between hammocks and pine rocklands, and on beach ridges in saline coastal areas. This species occurs in open areas on dry, sandy soil. *Euphorbia garberi* has been extirpated from the Miami area and from most of the Florida Keys in Monroe County where it was formerly found.

Federal Government actions on these species began with section 12 of the Endangered Species Act of 1973, which directed the Secretary of the Smithsonian Institution to prepare a report on plants considered to be endangered, threatened, or extinct. This report, designated as House Document No. 94-51, was presented to Congress on January 9, 1975. In this report *Euphorbia deltoidea* ssp. *deltoidea* was listed as threatened, and *Euphorbia garberi* was listed as endangered. On July 1, 1975 (40 FR 27823), the Service published a notice in the Federal Register of its acceptance of the report of the Smithsonian Institution as a petition within the context of section 4(c)(2) [now section 4(b)(3)] of the Act, and its intention thereby to review the status of the plant taxa named within. The above two taxa were included in the notice. On June 16, 1976, the Service published a proposed rule in the Federal Register (41 FR 24523) to determine approximately 1,700 vascular plant species to be endangered species pursuant to section 4 of the Act. The list of 1,700 plant taxa was assembled on the basis of comments and data received by the Smithsonian Institution and the Service in response to House Document No. 94-51 and the July 1, 1975, Federal Register publication. *Euphorbia garberi* was included in the proposed rule. General comments received in relation to the 1976 proposal were summarized in an April 26, 1978, Federal Register publication, which also determined 13 plant species to be endangered or threatened (43 FR 17909). On December 10, 1979, the Service published a notice of withdrawal of that portion of the June 16, 1976, proposal that had not been made final, along with four other proposals that had expired due to a procedural requirement of the 1978 Amendments. On December 15, 1980, the Service published a revised notice of review for native plants in the Federal Register (45 FR 82480); *Euphorbia deltoidea*, *Polygala smallii*, and *Euphorbia garberi* were included as category-1 species. Category 1 comprises taxa for which the Service presently has sufficient biological information to support their being

proposed to be listed as endangered or threatened species.

The Endangered Species Act Amendments of 1982 required that all petitions pending as of October 13, 1982, be treated as having been newly submitted on that date. The species covered by the December 15, 1980, notice of review were considered to be petitioned and the deadline for a finding on those species, including *Polygala smallii*, *Euphorbia deltoidea* ssp. *deltoidea* and *Euphorbia garberi*, was October 13, 1983. On October 13, 1983, and October 12, 1984, the Service found that the petitioned listing of these three taxa was warranted, and that although other pending proposals had precluded their proposal, expeditious progress was being made to list the species.

On March 22, 1984, the Service received a petition from Mr. Alan Herndon of the Department of Biology, Florida International University, Miami, Florida, to list *Amorpha crenulata* and *Galactia smallii* pursuant to the Endangered Species Act. On June 4, 1984, an administrative decision was made that the petition presented substantial information indicating that the petitioned action might be warranted. Notice to this effect was published in the Federal Register on July 13, 1984 (49 FR 28583).

On November 7, 1984 (49 FR 44507), the Service proposed to list *Euphorbia deltoidea* ssp. *deltoidea*, *Galactia smallii*, *Polygala smallii*, and *Amorpha crenulata* as endangered species, and to list *Euphorbia garberi* as a threatened species. That proposal incorporated findings, pursuant to section 4(b)(3)(B) of the Act and due by March 22 and October 13, 1985, that the actions requested by the two petitions referred to above were warranted.

Summary of Comments and Recommendations

In the November 7, 1984, proposed rule (49 FR 44507) and associated notifications, all interested parties were requested to submit factual reports or information that might contribute to the development of a final rule. Appropriate State agencies, county governments, Federal agencies, scientific organizations, and other interested parties were contacted and requested to comment. Newspaper notices were published in the *Miami Herald* and the *Key West Citizen* on November 26, 1984, which invited general public comment. No public hearing was requested or held.

Six comments were received. The proposed listings were supported by the Florida Game and Fresh Water Fish

Commission, the Florida Department of Natural Resources (Division of Recreation and Parks), the Florida Natural Areas Inventory (FNAI), and the State organization and a local chapter of the Florida Native Plant Society. The FNAI indicated that another site for *Amorpha crenulata* might exist; six plants were found on the site (a small cultivated lot) in 1982. A botanist supported the listing of *Euphorbia garberi*, noting that the single known remaining site for this species in the Florida Keys was vulnerable to storms.

Summary of Factors Affecting the Species

After a thorough review and consideration of all information available, the Service has determined that *Euphorbia deltoidea* ssp. *deltoidea*, *Galactia smallii*, *Polygala smallii*, and *Amorpha crenulata* should be classified as endangered species, and that *Euphorbia garberi* should be classified as a threatened species. Procedures found at section 4(a)(1) of the Endangered Species Act (16 U.S.C. 1531 et seq.) and regulations promulgated to implement the listing provisions of the Act (50 CFR Part 424) were followed. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1). These factors and their application to *Euphorbia deltoidea* Engelm. ex Chapman ssp. *deltoidea* (spurge), *Galactia smallii* H.J. Rogers ex Herndon (synonym: *G. prostrata* Small) (Small's milkpea), *Polygala smallii* Smith and Ward (synonym: *P. arenicola* Small) (tiny polygala), *Amorpha crenulata* Rydberg (crenulate lead-plant), and *Euphorbia garberi* Engelm. ex Chapm. (Garber's spurge) are as follows:

A. The present or threatened destruction, modification, or curtailment of their habitat or range. *Euphorbia deltoidea* ssp. *deltoidea*, *Galactia smallii*, *Polygala smallii*, and *Amorpha crenulata* are restricted to pinelands of the Miami rock ridge in Dade County, Florida. Conversion of pine rocklands for commercial and residential purposes began early in the twentieth century and accelerated after 1930. It has been estimated that 90 percent of Dade County's pine rocklands (exclusive of the pine rocklands within Everglades National Park, where these species do not occur) present in 1940 had been destroyed by 1972 (Robertson and Kushlan, 1974). The pinelands outside of Everglades National Park have been even further reduced since that time, and are now restricted to small isolated stands. Herndon (1984b) estimated that 98 percent of the Dade County pinelands

outside of Everglades National Park had been destroyed by 1984. The largest of these remnants are in county ownership; a few significant parcels are in private or Federal ownership. Originally, these plant species were probably distributed fairly widely throughout the pinelands, but apparently did not occur west of the Homestead area. The species occurring in Dade County parks (*Euphorbia deltoidea* ssp. *deltoidea* and *Amorpha crenulata*) are vulnerable to ongoing and potential future development for recreational purposes and the establishment of service roads, parking, and picnic areas.

Euphorbia deltoidea ssp. *deltoidea* var. *deltoidea* formerly occurred throughout the pinelands from Miami southwest to Cutler Ridge. It is now restricted to eight known sites in the vicinity of Cutler Ridge and Perrine. *Euphorbia deltoidea* ssp. *deltoidea* var. *adhaerens* formerly occurred at several sites in the Homestead-Goulds area; this species is now restricted to two sites near Homestead (Austin et al., 1980a).

The former range of *Galactia smallii* is poorly known, but this species is presently restricted to two known sites near Homestead (Herndon, 1984a).

Polygala smallii formerly existed from southeastern Broward County (near Fort Lauderdale) to the Cutler area in Dade County. This species is now restricted to two sites in the Cutler area (Austin et al., 1980b).

Amorpha crenulata formerly occurred throughout pinelands in the Miami-Coral Gables area; it is now known only from a few highly restricted sites within the Miami City limits (Herndon, 1984a).

Habitat destruction or modification threatening *Euphorbia garberi* includes residential and commercial development, lack of fire resulting in increased competition and shading out by other plant species, and natural risk from destruction by storms or hurricanes. *Euphorbia garberi* was formerly found from the Miami area southwest to Everglades National Park (ENP) and the Lower Florida Keys. Currently, the species is known from only four sites in ENP, one in Dade County and three in Monroe County, and one site on Big Pine Key, Monroe County. The species has apparently been extirpated from eight of the Florida Keys where it formerly occurred (Austin et al., 1980a). It has not been found in the Miami area since 1949. Three of the ENP populations are located in coastal areas where storm overwash could eliminate them. *Euphorbia garberi* was considered a "species of highest concern" in a rare plant report prepared by the Everglades National Park South

Florida Research Center (Loope and Avery, 1979). Another population is in a pineland area where periodic burning may be required to prevent overshading by shrubs. The Big Pine Key site is vulnerable to overshading and storm damage.

B. Overutilization for commercial, recreational, scientific, or educational purposes. *Euphorbia deltoidea* ssp. *deltoidea*, *Galactia smallii*, *Polygala smallii*, and *Amorpha crenulata* are so limited in distribution and population size that indiscriminate scientific or other collecting could adversely affect these species. Collecting is not known to occur at this time, but caution will be necessary to ensure that increased publicity does not spark such collecting.

C. Disease or predation. Not applicable to these species.

D. The inadequacy of existing regulatory mechanisms. *Polygala smallii* is considered endangered by the Florida Committee on Rare and Endangered Plants and Animals (Ward, 1979), but this recognition provides no protection to the plant or its habitat. *Euphorbia deltoidea* ssp. *deltoidea* and *Amorpha crenulata* occur in Dade County parks, but are not accorded any specific protection in park planning or development. *Euphorbia garberi* is provided some protection by its presence in ENP, but is unprotected outside the Park. National Park Service regulations prohibit the removal of plants from parks; these regulations will be further strengthened by prohibitions of the Act that restrict the removal and reduction to possession of endangered plants from lands under Federal jurisdiction (proposed to be implemented for threatened plants at 48 FR 31417, July, 1983).

Dade County sponsors an Environmentally Endangered Lands (EEL) program which provides property tax benefits to landowners who agree to maintain healthy forestlands. The program includes prescribed burning for pineland. Over 20 tracts of land supporting pinelands are now included in the EEL program, but these lands do not include any of the currently known sites for the species in this regulation.

E. Other natural or manmade factors affecting its continued existence. Pine rockland habitat in Dade County succeeds to hardwood hammock in the absence of periodic burning. Pine rockland plants are gradually shaded out as succession takes place. As Dade County becomes increasingly developed and the pinelands smaller and more fragmented, fire suppression is more apt to occur. Invasion of exotic plants is also affecting the pinelands. Two

species currently invading this habitat are *Schinus terebinthifolius* (Brazilian pepper) and a large reed (*Neyraudia reynaudiana*). Other exotic plants, which are extremely widespread in south Florida, may also invade pine rocklands in the future. The orchid tree (*Bauhinia variegata*) is currently present in some pinelands. Most of the remaining pinelands are surrounded with suburban landscaping dominated by exotic plants. Fire suppression and exotic plant competition affect *Euphorbia deltoidea* ssp. *deltoidea*, *Galactia smallii*, *Polygala smallii*, and *Amorpha crenulata*.

The Service has carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by these species in determining to make this rule final. Based on this evaluation, the preferred action is to list *Euphorbia deltoidea* ssp. *deltoidea*, *Galactia smallii*, *Polygala smallii*, and *Amorpha crenulata* as endangered species and to list *Euphorbia garberi* as a threatened species. The former four species have already been extirpated over most of their historic range and could become extinct in the near future. *Euphorbia garberi* has been largely extirpated over its former range and is threatened at one or more of the remaining sites. The reasons for not proposing critical habitat for these species are discussed below in the "Critical Habitat" section.

Critical Habitat

Section 4(a)(3) of the Act, as amended, requires that to the maximum extent prudent and determinable, the Secretary designate critical habitat at the time a species is determined to be endangered or threatened. The Service finds that designation of critical habitat is not prudent for these species at this time. *Euphorbia deltoidea* ssp. *deltoidea*, *Galactia smallii*, *Polygala smallii*, and *Amorpha crenulata* are sufficiently restricted that scientific collecting or vandalism could seriously damage the remaining populations of these species. Publication of critical habitat descriptions and maps in the *Federal Register* would increase the likelihood of such activities. Similarly, it would not be prudent to publish descriptions and maps of the few known sites of *Euphorbia garberi*. While collecting is generally prohibited in Monroe County Parks and in Everglades National Park, these prohibitions are difficult to enforce. The Service believes that Federal involvement in the areas where these plants occur can be identified without the designation of critical habitat. Therefore, there is no benefit in

designation of critical habitat for these plants.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Endangered Species Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Endangered Species Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. Such actions are initiated by the Service following listing. The protection required of Federal agencies and the prohibitions against taking are discussed, in part, below.

Section 7(a) of the Act, as amended, requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR Part 402 and are now under revision (see proposal at 48 FR 29990; June 29, 1983). Section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with the Service.

Euphorbia deltoidea ssp. *deltoidea* occurs on land under the jurisdiction of the U.S. Army. The Army is currently conferring with the Service regarding the development of Reserve facilities on the pineland site. This process is anticipated to become a consultation, with determination of *Euphorbia deltoidea* ssp. *deltoidea* to be an endangered species.

Euphorbia garberi occurs in Everglades National Park. Park management includes prescribed burning of pinelands in areas where *Euphorbia garberi* is located. The present burning schedules, aimed at maintaining pinelands, should benefit this species. This activity will be subject to consultation under section 7 of the Endangered Species Act. No monitoring of this plant species is currently being done in the Park; the listing could focus increased attention on its status.

The Act and its implementing regulations found at 50 CFR 17.61, 17.62, and 17.63 for endangered plants and 17.71 and 17.72 for threatened plants set forth a series of general trade prohibitions that apply to all endangered and threatened plant species. With respect to *Euphorbia deltoidea* ssp. *deltoidea*, *Galactia smallii*, *Polygala smallii*, *Amorpha crenulata*, and *Euphorbia garberi*, all trade prohibitions of section 9(a)(2) of the Act, implemented by 50 CFR 17.61 and 17.71, would apply. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to import or export, transport in interstate or foreign commerce in the course of a commercial activity, or sell or offer for sale these species in interstate or foreign commerce. Seeds from cultivated specimens of threatened plant species are exempt from these prohibitions provided that a statement of "cultivated origin" appears on their containers. Certain exceptions can apply to agents of the Service and State conservation agencies. The Act and 50 CFR 17.62, 17.63, and 17.72 also provide for the issuance of permits to carry out otherwise prohibited activities involving endangered and threatened species under certain circumstances. It is anticipated that few trade permits would ever be sought or issued since the species are virtually unknown in cultivation and are uncommon in the wild.

Section 9(a)(2)(B) of the Act, as amended in 1982, prohibits the removal and reduction to possession of endangered plant species from areas under Federal jurisdiction. This prohibition now applies to *Euphorbia deltoidea* ssp. *deltoidea* of Federal lands. Section 4(d) allows for the provision of such protection to threatened species through regulations. This protection will apply to *Euphorbia garberi* in ENP once revised regulations are promulgated. Everglades National Park regulations already prohibit collecting, except under permit, so the existing situation will be unchanged. The remaining plants considered in the rulemaking would be given similar protection to the extent they are located on land subject to Federal jurisdiction. Permits for exceptions to this prohibition are available through sections 10(a) and 4(d) of the Act, until revised regulations are promulgated to incorporate the 1982 Amendments. Proposed regulations implementing this prohibition were published on July 8, 1983 (48 FR 31417), and it is anticipated that these will be made final following

public comment. It is likely that few collecting permits for these species will ever be requested. Requests for copies of the regulations on plants and inquiries regarding them may be addressed to the Federal Wildlife Permit Office, U.S. Fish and Wildlife Service, Washington, D.C. 20240 (703/235-1903).

National Environmental Policy Act

The Fish and Wildlife Service has determined that an Environmental Assessment, as defined under authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act of 1973, as amended. A notice outlining the Service's reasons for this determination was published in the Federal Register on October 25, 1983 (48 FR 49244).

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Author

The primary author of this final rule is Dr. Michael M. Bentzien, U.S. Fish and Wildlife Service, 2747 Art Museum Drive, Jacksonville, Florida 32207 (904/791-2580 or FTS 946-2580).

List of Subjects in 50 CFR Part 17

Endangered and threatened wildlife, Fish, Marine mammals, Plants (agriculture).

Regulations Promulgation

PART 17—[AMENDED]

Accordingly, Part 17, Subchapter B of Chapter I, Title 50 of the Code of Federal Regulations, in amended as set forth below:

1. The authority citation for Part 17 reads as follows:

Authority: Pub. L. 93-205, 87 Stat. 884; Pub. L. 94-359, 90 Stat. 911; Pub. L. 95-632, 92 Stat. 3751; Pub. L. 96-159, 93 Stat. 1225; Pub. L. 97-304, 96 Stat. 1411 (16 U.S.C. 1531 *et seq.*).

2. Amend § 17.12(h) by adding the following, in alphabetical order under family names indicated, to the List of Endangered and Threatened Plants:

§ 17.12 Endangered and threatened plants.

(h) * * *

Species		Historic range	Status	When listed	Critical habitat	Special rules
Scientific name	Common name					
Euphorbiaceae—Spurge family:						
<i>Euphorbia (Chamaesyce) deltoidea</i> ssp. <i>deltoidea</i>	Spurge	U.S.A. (FL)	E	190	NA	NA
<i>Euphorbia (Chamaesyce) garberi</i>	None	U.S.A. (FL)	T	190	NA	NA
Fabaceae—Pea family:						
<i>Amorpha crenulata</i>	Crenulate lead-plum	U.S.A. (FL)	E	190	NA	NA
<i>Galactia smallii</i>	Small's milkpea	U.S.A. (FL)	E	190	NA	NA
Polygalaceae—Milkwort family:						
<i>Polygala smallii</i>	Tiny polygal a ELS	U.S.A. (FL)	E	190	NA	NA

Dated: June 27, 1985.

J. Craig Potter,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 85-17077 Filed 7-17-85; 8:45 am]

BILLING CODE 4310-65-M

Federal Register

Thursday
July 18, 1985

Part VI

Department of Education

34 CFR Parts 425, 426, 431, and 432
State-Administered Adult Education
Program and National Adult Education
Discretionary Program; Final Regulations

DEPARTMENT OF EDUCATION

34 CFR Parts 425, 426, 431, and 432

State-Administered Adult Education Program and National Adult Education Discretionary Program

AGENCY: Department of Education.

ACTION: Final Regulations.

SUMMARY: The Secretary of Education issues final regulations to implement the Adult Education Act, which was amended and extended by the Education Amendments of 1984, Pub. L. 98-511. These regulations govern the State-administered program of adult basic and adult secondary education and the national adult education discretionary program for research, development, demonstration, dissemination, and evaluation. An additional purpose of these regulations is to reduce the administrative burden on grantees, to allow more flexibility in program administration to State educational agencies, to eliminate certain existing regulations that are unnecessary, and to clarify certain provisions of the existing regulations to make them more understandable to the public.

EFFECTIVE DATE: These regulations take effect either 45 days after publication in the *Federal Register* or later if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person.

FOR FURTHER INFORMATION CONTACT:

Paul V. Delker, Director, Division of Adult Education, U.S. Department of Education, (ROB-3, Room 5610), 400 Maryland Avenue, SW., Washington, D.C. 20202-3585, Telephone: (202) 245-9793; or Thomas L. Johns, Chairperson, Adult Education Regulations Task Force, U.S. Department of Education, (ROB-3, Room 5126), 400 Maryland Avenue, SW., Washington, D.C. 20202-3579, Telephone: (202) 245-8176.

SUPPLEMENTARY INFORMATION:

Background

Title I of the Education Amendments of 1984 (Pub. L. 98-511) amends and extends the Adult Education Act (the Act), enacted in Pub. L. 91-230 (20 U.S.C. 1201 *et seq.*), as amended. The primary purpose of the Act has been, and continues to be under the recent amendments, to offer educationally disadvantaged adults an opportunity to acquire basic literacy skills necessary to function in society, to continue their education to at least the level of completion of secondary school, and to

become able to secure training that will make them more employable, productive, and responsible citizens.

There are two major parts to the adult education program established by the Act: The State-administered adult education program and the national adult education discretionary program.

The State-administered adult education program establishes a cooperative effort between the Federal Government and the States. Federal funds are allocated to the States on a formula basis, and the States, in turn, fund local programs of adult education based on need and resources available. The regulations governing the State-administered program are found in 34 CFR Parts 425 and 426.

The Act also authorizes a national adult education discretionary program. At an appropriation level of \$112 million, or higher, the Secretary may set aside up to five percent of that amount for projects under section 309 of the Act. At the current appropriation level of \$100 million for program operations, this authority is not available to the Secretary. The regulations governing the national discretionary program are found in 34 CFR Part 431.

As noted in § 425.2(a) of these regulations, the Education Department General Administrative Regulations (EDGAR) apply to the adult education programs. Specific regulatory requirements for EDGAR are not repeated in these regulations. However, particular attention should be directed to the following EDGAR requirements:

(A) The SEA must have on file with the Secretary a single State application that covers adult education programs (34 CFR 76.101).

(B) By submitting a single State application under 34 CFR 76.101, an SEA meets the requirements of section 306(b)(6) of the Act, covering fiscal control and fund accounting procedures.

(C) By submitting a single State application under 34 CFR 76.101, an SEA gives assurance that it will evaluate—not less often than once every three years—the effectiveness of section 306 and section 310 programs in meeting statutory objectives.

(D) A State plan for adult education must include the certifications required by 34 CFR 76.104.

(E) Computation of the non-Federal share of expenditures for matching or cost-sharing is discussed in 34 CFR 74.52. The non-Federal share of expenditures under the State plan may be computed on a statewide basis and may come from any source other than Federal assistance so long as these expenditures are made to further the

purposes of the State plan for adult education.

(F) An SEA must administer special experimental demonstration projects and teacher training projects under section 310 of the Act in accordance with the requirements contained in Subparts D and E of 34 CFR Part 76.

Summary of Major Areas of Public Comment

The State-administered Adult Education Program and National Adult Education Discretionary Program regulations were published as a Notice of Proposed Rulemaking (NPRM) in the *Federal Register* on February 28, 1985 (50 FR 8304). The Secretary invited comments on the proposed rules. In response to these comments changes were made in these final regulations. Summarized below are the major areas of comment and the Secretary's response. Appendix A contains a summary of all comments and responses received on the Notice of Proposed Rulemaking.

(a) *Limited English proficiency.* Two commenters urged that the definition of "limited English proficiency" be taken verbatim from title VII of the Elementary and Secondary Education Act of 1965, as amended. The definition is added in § 425.3. The Secretary agrees with the commenters that this definition relates to a particular subset of that population with limited English language skills and is required by section 306(b)(11) of the Act. The definition in the proposed regulations of "limited English language skills" is retained because this term is used both in the Act and the regulations and defines a broader population than those included under the definition of "limited English proficiency."

(b) *Data collection.* Commenters suggested that the regulatory language on data collection should reflect the requirements of section 306(b)(14) of the Act. The program assurance in § 426.11(b)(8) has been changed to reflect more explicitly these requirements.

(c) *Clarification of terms.* Commenters called attention to a variance in terms relating to employment and training between those used in the adult education program and those used in current legislation authorizing vocational education and job training programs.

The Secretary agrees that the terms should be consistent and has made the appropriate changes:

(1) In § 426.12(a)(10), the term "State manpower and training agencies" has

been changed to *State employment and training agencies*.

(2) In § 426.12(a)(11), the term "Local manpower and training agencies" has been changed to *Local employment and training agencies*.

(3) In § 426.12(i)(1), the term "State manpower service councils" has been changed to *State job training coordinating councils*.

(d) *Outreach activities*. Two commenters questioned the advisability of including the stipulation in § 426.12(h)(2) that a concerted effort be made to obtain such services as transportation and child care through other than adult education program resources. The Secretary agrees that this language may be misinterpreted by a State to preclude the expenditure of any funds under the Act for these services. The stipulation has been deleted in these final regulations.

(e) *Evaluation*. One commenter suggested that more frequent evaluations be required. Another commenter recommended that the requirement in § 426.12(o) be clarified.

Section 426.12(o) of the proposed regulations has been deleted from the final regulations. By submitting a single State application under 34 CFR 76.101, an SEA gives assurance that it will evaluate—not less often than once every three years—the effectiveness of section 306 and section 310 programs in meeting statutory objectives.

(f) *Administration*. One commenter pointed out that the provision in § 426.21 that stipulates that "allowable administrative costs must be necessary and reasonable for proper and efficient administration of the program" is also set forth in Appendix C to 34 CFR Part 74. The language has been deleted from the final regulations. It is Department policy not to repeat requirements set forth in the Education Department General Administrative Regulations in other regulations.

(g) *Dissemination plan*. A change has been made in the final regulations. One commenter, addressing the criterion on the dissemination plan, as set forth in § 431.31 of the proposed regulations, recommended that products of these national projects be disseminated to all parties concerned about illiteracy and other adult education problems. The Secretary agrees and has deleted the restrictive reference to "educators" in § 431.31(g)(2)(iii).

(h) *Application approval*. One commenter objected to the requirement in § 426.32(b)(2) that an applicant other than a local educational agency must provide the applicable local educational agency the opportunity to comment on the application prior to submitting it to

the State. The commenters pointed out that while section 304(a)(1) of the Act does require that the opportunity to comment must take place prior to approval of an application by the State educational agency, the Act does not require that the opportunity to comment must take place prior to submission of the application to the State.

The Secretary agrees with the commenter, and the phrase "prior to submitting it to the State" has been deleted from § 426.32(b)(2).

Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the Order.

Intergovernmental Review

The State-administered adult education program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR Part 79. The objective of the Executive Order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the Order, this document is intended to provide early notification of the Department's specific plans and actions for this program.

Assessment of Educational Impact

In the notice of proposed rulemaking, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the response to the proposed rules and on its own review, the Department has determined that the regulations in this document do not require information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects

34 CFR Part 425

Administrative practice and procedure, Adult education, Education, Grant programs—education.

34 CFR Part 426

Adult education, Education, Grant programs—education, Reporting and recordkeeping requirements, State advisory councils, Teachers.

34 CFR Part 431

Adult education, Education, Grant programs—education, Nonprofit organizations, Reporting and recordkeeping requirements.

34 CFR Part 432

Adult education, Education, Grant programs, Immigrants, Indochina, Non-profit organizations, Refugees.

Citation of Legal Authority

A citation of statutory or other legal authority is placed in parentheses on the line following each substantive provision of these final regulations.

(Catalog of Federal Domestic Assistance Numbers: 84.002 Adult Education—State-administered Program; National Adult Education Discretionary Program (Number not assigned))

Dated: July 15, 1985.

William J. Bennett,

Secretary of Education.

The Secretary amends Parts 425, 426, and 431 and removes Part 432 of Title 34 of the Code of Federal Regulations as follows:

1. Part 425 is revised to read as follows:

PART 425—ADULT EDUCATION—GENERAL PROVISIONS

Subpart A—General

Sec.

425.1 What are the Adult Education Programs?

425.2 What regulations apply to the Adult Education Programs?

425.3 What definitions apply to the Adult Education Programs?

425.4–425.9 [Reserved]

Subpart B—What Kinds of Activities Does the Secretary Assist Under the Adult Education Program?

425.10 What kinds of activities does the Secretary assist?

Authority: Secs. 301–315 of the Adult Education Act, as amended by Pub. L. 98–511; 20 U.S.C. 1201 *et seq.*, unless otherwise noted.

Subpart A—General

§ 425.1 What are the Adult Education Programs?

(a) Under the Adult Education Programs the Secretary provides Federal financial assistance to encourage and expand educational opportunities for adults.

(b) The regulations in this Part 425 govern the following programs:

(1) 34 CFR Part 426—State-Administered Adult Education Program.

(2) 34 CFR Part 431—National Adult Education Discretionary Program.

(20 U.S.C. 1201 *et seq.*)

§ 425.2 What regulations apply to the Adult Education Programs?

The following regulations apply to the Adult Education Programs:

(a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR Part 74 (Administration of Grants), Part 75 (Direct Grant Programs), (applicable only to Part 431), Part 76 (State-administered Programs) (applicable only to Part 426), Part 77 (Definitions that Apply to Department Regulations), Part 78 (Education Appeal Board), and Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(b) The regulations in this part.

(c) The regulations in 34 CFR Parts 426 and 431.

(20 U.S.C. 1201 *et seq.*)

§ 425.3 What definitions apply to the Adult Education Programs?

(a) *Program definitions.* The following definitions apply to 34 CFR Parts 426 and 431:

"Act" means the Adult Education Act as amended (20 U.S.C. 1201 *et seq.*)

"Adult" means an individual who has attained 16 years of age or who is beyond the age of compulsory school attendance under State law, except that for the purpose of section 305(a) of the Act, the term "adult" means an individual 18 years of age or older.

"Adult basic education" means adult education for adults whose inability to speak, read, or write the English language constitutes a substantial impairment of their ability to get or retain employment commensurate with their real ability, which is designed to help eliminate such inability and raise the level of education of those individuals with a view to making them less likely to become dependent on others, to improving their ability to benefit from occupational training and otherwise increasing their opportunities for more productive and profitable employment, and to making them better able to meet their adult responsibilities.

"Adult education" means instruction or services below the college level for adults who do not have—

(1) The basic skills to enable them to function effectively in society; or

(2) A certificate of graduation from a school providing secondary education (and who have not achieved an equivalent level of education).

"Basic literacy skills," as used in § 425.10(b)(1), means the skills taught in adult basic education.

"Community school program" means a program in which a public building, including but not limited to public elementary or secondary school or a

community or junior college, is used as a community center operated in conjunction with other groups in the community, community organizations, and local governmental agencies, to provide educational, recreational, cultural, and other related community services for the community that center serves in accordance with the needs, interests, and concerns of that community.

"Immigrant" means any refugee admitted or paroled into this country or any alien except one who is exempt under the provisions of the Immigration and Nationality Act, as amended.

(8 U.S.C. 1101(a)(15))

"Institution of higher education" means any such institution as defined by section 481 of the Higher Education Act of 1965.

"Institutionalized person" means an adult, as defined in the Act, who is an inmate, patient, or resident of a correctional, medical, or special institution.

"Limited English language skills" refers to difficulty of adults in speaking, reading, writing, or understanding the English language so that those adults are denied the opportunity to learn successfully in a learning environment where the language of instruction is English.

"Limited English proficiency" and "Limited English proficient" where used with reference to individuals means—

(1) Individuals who were not born in the United States or whose native language is a language other than English;

(2) Individuals who come from environments where a language other than English is dominant; and

(3) Individuals who are American Indian and Alaskan Natives and who come from environments where a language other than English has had a significant impact on their level of English language proficiency, and who, by reason thereof, have sufficient difficulty speaking, reading, writing, or understanding the English language to deny those individuals the opportunity to learn successfully in classrooms where the language of instruction is English or to participate fully in our society.

(20 U.S.C. 3223(a)(1))

"Local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such

combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools, except that, if there is a separate board or other legally constituted local authority having administrative control and direction of adult education in public schools therein, the term means that other board or authority.

"Outreach" means activities designed to—

(1) Inform adult populations who are least educated and most in need of assistance of the availability and benefits of the adult education program; and

(2) Assist these adult populations to participate in the program by providing reasonable and convenient access.

"State" includes, in addition to the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

"State administrative costs" means costs for those management and supervisory activities necessary for the direction and control by the State educational agency responsible for developing the State plan and overseeing the implementation of the adult education program under the Act. The term includes those costs incurred for State Advisory Councils under section 311 of the Act, but does not include those costs incurred for ancillary services such as evaluation, teacher training dissemination, and curriculum development.

"State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools; or if there is a separate State agency or officer primarily responsible for supervision of adult education in public schools, then that agency or officer may be designated for the purpose of the Act by the Governor or by State law. If no agency or officer qualifies under the preceding sentence, the term means an appropriate agency of officer designated for the purpose of the Act by the Governor.

(b) *Definitions in EDGAR.* The following terms used in this part and Parts 426 and 431 are defined in 34 CFR Part 77:

Applicant
Application
Award
Budget
Budget period
ED
EDGAR

Grant
Grantee
Nonprofit
Private
Project
Project period
Public
Secretary
Subgrant
Subgrantee

(Sec. 303; 20 U.S.C. 1201 *et seq.*)

§§ 425.4-425.9 [Reserved]

Subpart B—What Kinds of Activities Does the Secretary Assist Under the Adult Education Programs?

§ 425.10 What kinds of activities does the Secretary assist?

The Secretary provides financial assistance to expand educational opportunities for adults and to encourage the establishment of programs of adult education that will—

(a) Enable all adults to acquire basic literacy skills necessary to function in society;

(b) Enable adults who so desire to continue their education to at least the level of completion of secondary school; and

(c) Make available to adults the means to secure training and education that will enable them to become more employable, productive, and responsible citizens.

(Sec. 302; 20 U.S.C. 1201)

2. Part 426 is revised to read as follows:

PART 426—STATE-ADMINISTERED ADULT EDUCATION PROGRAM

Subpart A—General

Sec.

426.1 How is the State-administered adult education program governed?

Subpart B—How Does a State Apply for a Grant?

426.10 Who is eligible?

426.11 What documents must a State submit to receive its grant?

426.12 What must the State plan contain?

426.13-426.19 [Reserved]

Subpart C—How is a Grant Made to a State?

426.20 How is the amount of each State's grant determined?

426.21 How does a State provide for the administrative of the program?

426.22-426.29 [Reserved]

Subpart D—How Does a State Distribute Funds?

426.30 Who is eligible for a subgrant or contract?

426.31 How does a State distribute funds?

426.32 How does a State approve applications?

Sec.

426.33 What are special experimental demonstration projects and teacher training projects?

426.34-426.39 [Reserved]

Subpart E—What Conditions Must Be Met by a State?

426.40 What are the matching requirements of the program?

426.41 What are the maintenance of effort requirements of the program?

426.42 How is a maintenance of effort waiver granted?

426.43 What are exceptional or uncontrollable circumstances?

426.44 How is maintenance of effort computed in the event of a waiver?

426.45 What are a State's responsibilities regarding State advisory councils and what the functions of these councils?

426.46-426.49 [Reserved]

Authority: Secs. 301-315 of the Adult Education Act, as amended by Pub. L. 98-511, 20 U.S.C. *et seq.*, unless otherwise noted.

Subpart A—General

§ 426.1 How is the State-administered adult education program governed?

(a) *Federal-State relationship.* The State-administered adult education program is a cooperative effort between the Federal Government and the States to provide adult education. Federal funds are granted to the States on a formula basis. The States fund local programs of adult education based on need and resources available.

(b) *Other applicable provisions.* The provision of 34 CFR Part 425 apply to the State-administered adult education program under this part.

(20 U.S.C. 1201 *et seq.*)

Subpart B—How Does a State Apply for a Grant?

§ 426.10 Who is eligible?

Any State may apply for a grant under this part.

(Sec. 304(a); 20 U.S.C. 1203(a))

§ 426.11 What documents must a State submit to receive its grant?

A State educational agency (SEA) shall submit to the Secretary the following:

(a) A State plan, developed once every three years, that meets the requirements of the Act and the regulations in this part.

(b) Program assurances, signed by an authorized official of the SEA, to provide that—

(1) Special emphasis will be given to adult basic education programs except where these needs have been met in the State;

(2) Adult enrolled in adult basic education programs will not be charged

tuition, fees, or any other charges, or be required to purchase any books or any other materials that are needed for participation in the program;

(3) The SEA will make available not to exceed 20 percent of the funds granted to the State under the Act for programs of equivalency for a certificate of graduation from a secondary school;

(4) Not more than 20 percent of the funds granted to the State under the Act for any fiscal year will be used for the education of institutionalized adults;

(5) The SEA will use not less than 10 percent of the funds granted to the State under the Act for special experimental demonstration projects and teacher training projects under section 310 of the Act.

(6) Special assistance will be given to the needs of persons with limited English proficiency by providing bilingual adult education programs of instruction in English and, to the extent necessary to allow these persons to progress effectively through the adult education program, in the native language of these persons; and these programs will be carried out in coordination with programs of bilingual education assisted under title VII of the Elementary and Secondary Education Act of 1985 and bilingual vocational education programs under the Carl D. Perkins Vocational Education Act;

(7) (i) For each year covered by the plan, the fiscal effort per student or the aggregate amount available for expenditure by the State for adult education from non-Federal sources for the preceding fiscal year was not less than the fiscal effort per student or the amount available for expenditure for such purposes from those sources during the second preceding fiscal year;

(ii) In the event of exceptional and uncontrollable circumstances, the State may, under § 426.42, request a one-time waiver of the requirement in paragraph (b)(7)(i) of this section;

(8) The SEA will report information about the State's adult education students, programs, expenditures, and goals, as may be required by the Secretary, together with information with respect to the age, sex, and race of students in the programs assisted under the Act and whether the students complete those programs; and

(9) The SEA will send to the Secretary one copy of each final report of special experimental demonstration projects and teacher training projects supported under section 310 of the Act.

(Approved under OMB Control No. 1830-0027)

Secs. 304(b), 306, 307(b) and 310; 20 U.S.C. 1203(b), 1205, 1206(b), 1208.)

§ 426.12 What must the State plan contain?

An SEA shall include all of the following in its State plan:

(a) The SEA shall describe the means by which one or more representatives of each of the following agencies and groups were involved in the development of the State plan and how they will continue to be involved in carrying out the plan:

- (1) The business community.
- (2) Industry.
- (3) Labor unions.
- (4) Public educational agencies and institutions.
- (5) Private educational agencies and institutions.
- (6) Churches.
- (7) Fraternal/sororal organizations.
- (8) Voluntary organizations.
- (9) Community organizations.
- (10) State employment and training agencies.
- (11) Local employment and training agencies.
- (12) Adult residents of rural areas.
- (13) Adult residents of urban areas with high rates of unemployment.
- (14) Adults with limited English language skills.
- (15) Institutionalized adults.
- (16) Other entities concerned with adult education, such as basic skills programs, volunteer literacy programs, libraries, and organizations offering education programs for older persons and military personnel and their adult dependents.

(b) The SEA shall describe—

(1) Its accomplishments in meeting the goals included in the previous three-year plan; and

(2) How the assessment of accomplishments and the evaluation required by paragraph (a) of this section were considered in establishing the State's goals for adult education in the plan being submitted.

(c) The SEA shall describe, for the three-year period covered by the plan, the adult education needs of all segments of the adult population in the State.

(d) The SEA shall—

(1) Demonstrate that the special educational needs of adult immigrants in the State have been examined; and

(2) Provide for the implementation of adult education and adult basic education programs for immigrants to meet existing needs.

(e) The SEA shall identify the other Federal and non-Federal resources available to meet the needs described in paragraph (c) of this section.

(f) The SEA shall describe its planned use of Federal funds for the administration of the program under

§ 426.21 including any planned expenditures for a State advisory council under § 426.45.

(g) The SEA shall—

(1) Identify the goals it intends to achieve in meeting the needs described in paragraph (c) of this section for the period covered by the plan. These goals must be designed to develop a statewide program in which the adult populations in the State that are least educated and most in need of assistance are served in a manner whereby they learn most effectively; and

(2) Describe proposed activities for reaching each goal and give estimated percentages of funds under the State plan to be allocated to each goal.

(h) The SEA shall describe—

(1) The outreach activities that the State intends to carry out during the period covered by the plan; and

(2) In conjunction with these outreach activities, for the period covered by the State plan, the efforts it will undertake to assist adult participation in adult education programs through flexible course schedules, convenient locations, adequate transportation, and child care services.

(i) The SEA shall describe the procedures the State will use to ensure that in carrying out the program there will be—

(1) Adequate consultation, cooperation, and coordination among the SEA State job training coordinating councils, State occupational information systems, and other agencies, organizations, and institutions in the State which operate employment and training programs or other educational or training programs for adults; and

(2) Coordination of programs carried out under this part with other programs carried out by State and local agencies, including reading improvement programs, designed to provide reading instruction for adults.

(j) The SEA shall describe the local application process and the criteria for evaluating local applications submitted by all eligible applicants for subgrants or contracts.

(k) The SEA shall describe the method of determining the amount of funds to be distributed to applicants approved for funding.

(l) The SEA shall describe the means by which the delivery of adult education services will be significantly expanded by—

(1) Efforts to increase the number of participating agencies, institutions, and organizations other than the public school systems, such as business, labor unions, libraries, institutions of higher education, public health authorities,

antipoverty programs, and community organizations; and

(2) Efforts to increase the number of participants in adult basic education.

(m) An SEA that is prohibited by State law from awarding Federal funds by grant or contract to public or private agencies, organizations, or institutions, other than local educational agencies, shall describe in its State plan—

(1) The legal basis of this prohibition; and

(2) How public or private agencies, organizations, or institutions will be used for expanding the delivery of services.

(n) The SEA shall describe—

(1) Its policies, procedures, and activities for carrying out special experimental demonstration projects and teacher training projects in accordance with § 426.33; and

(2) Its criteria and priorities for awarding special projects and teacher training projects.

(Approved Under OMB Control No. 1830-0026)

(Secs. 306 and 310; 20 U.S.C. 1205, 1208)

§§ 426.13-426.19 [Reserved]**Subpart C—How is a Grant Made to a State?****§ 426.20 How is the amount of each State's grant determined?**

The Secretary determines the amount of each State's grant according to the formula in section 305(a) of the Act.

(Sec. 305; 20 U.S.C. 1204)

§ 426.21 How does a State provide for the administration of the program?

A State may use funds received under section 304 of the Act to provide for State and local administration of the program. A State shall determine allowable local administrative costs.

(Sec. 306(b)(2); 20 U.S.C. 1205(b)(2))

§§ 426.22-426.29 [Reserved]**Subpart D—How Does a State Distribute Funds?****§ 426.30 Who is eligible for a subgrant or contract?**

(a) Local educational agencies and public or private agencies, organizations, and institutions are eligible to apply for funds.

(b) An SEA shall give public notification of the availability of Federal and State funds to eligible applicants—

(1) For the purpose of notifying local educational agencies, an SEA shall provide the notice directly; and

(2) For the purpose of notifying public or private agencies, organizations, and

institutions, an SEA shall give sufficient public notice throughout all regions of the State.

(Sec. 304; 20 U.S.C. 1203)

§ 426.31 How does a State distribute funds?

(a) An SEA shall distribute funds on the basis of applications submitted by eligible applicants.

(b) If funds are awarded to a for-profit agency, organization, or institution, the award must be in the form of a contract.

(Sec. 304; 20 U.S.C. 1203)

§ 426.32 How does a State approve applications?

(a) An SEA may not approve an application from a for-profit agency, organization, or institution unless the State has first determined that the applicant—

(1) Can make a significant contribution to attaining the objectives of the Act; and

(2) Can provide substantially equivalent education at a lesser cost or can provide services and equipment not available in public institutions.

(b) An SEA may not approve an application from a public or private agency, organization, or institution other than a local educational agency unless the applicant—

(1) Provides assurance to the State that advice on the development of its application has been sought from the applicable local educational agency, located in the same city, county, township, school district, or other political subdivision of the State to be served by the applicant; and

(2) Provides the applicable local educational agency the opportunity to comment on the application.

(Sec. 304; 20 U.S.C. 1203)

§ 426.33 What are special experimental demonstration projects and teacher training projects?

In accordance with section 310 of the Act, the SEA shall provide assistance for—

(a) Special projects which will be carried out in furtherance of the purposes of the Act, and which—

(1) Involve the use of innovative methods, including methods for educating persons of limited English-speaking ability, systems, materials, or programs which may have national significance or may be of special value in promoting effective programs under the Act; or

(2) Involve programs of adult education, including education for persons of limited English-speaking ability, which are part of community

school programs, carried out in cooperation with other Federal, federally assisted, State, or local programs which have unusual promise in promoting a comprehensive or coordinated approach to the problems of persons with educational deficiencies; and

(b) Training persons engaged, or preparing to engage, as personnel in programs designed to carry out the purposes of the Act.

(Sec. 310; 20 U.S.C. 1208)

§§ 426.34–426.39 [Reserved]

Subpart E—What Conditions Must be Met by a State?

§ 426.40 What are the matching requirements of the program?

(a) The Federal share of expenditures made under a State plan may not exceed 90 percent of the cost of carrying out a State's program.

(b) The Federal share for American Samoa, Guam, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and the Virgin Islands is 100 percent.

(Sec. 307; 20 U.S.C. 1206)

§ 426.41 What are the maintenance of effort requirements of the program?

(a) To be eligible for Federal funds a State shall expend for adult education from non-Federal sources an amount equal to the fiscal effort of the State in the preceding fiscal year.

(b) A State may determine its fiscal effort on a per student expenditure basis or on a total expenditure basis.

(Sec. 307; 20 U.S.C. 1206)

§ 426.42 How is a maintenance of effort waiver granted?

(a) The Secretary may waive for one fiscal year only the maintenance of effort requirement in section 307(b) of the Act if the Secretary determines it would be equitable to do so in view of exceptional or uncontrollable circumstances affecting a State.

(b)(1) If an SEA wishes to receive a waiver from the maintenance of effort requirement in paragraph (a) of this section, the SEA shall submit a request for a waiver.

(2) An SEA shall include in the request for a waiver the reason for the request and any additional information the Secretary may require.

(Sec. 307; 20 U.S.C. 1206)

§ 426.43 What are exceptional or uncontrollable circumstances?

(a) The Secretary considers

exceptional or uncontrollable circumstances under § 426.42 to include situations in which a State had no control of the events resulting in decreased expenditures but has made a reasonable effort in a timely fashion to comply with the maintenance of effort requirement of the Act.

(b) Exceptional or uncontrollable circumstances include, but are not limited to, the following situations:

(1) A sudden, substantial reduction in available revenue due to—

(i) A natural disaster;

(ii) The unforeseen removal of property from the tax roll by government action; or

(iii) The unforeseen departure of an industrial or commercial facility.

(2) An uncontrollable diversion of available revenue to other purposes outside the control of the State due to emergency circumstances such as those resulting from a disaster of human or natural causes.

(Sec. 307; 20 U.S.C. 1206)

§ 426.44 How is maintenance of effort computed in the event of a waiver?

A State shall determine fiscal effort for the year following the year for which a waiver is granted based on the level of effort that existed prior to the waiver. For example, if in fiscal year (FY) 1986 a State receives a waiver for its failure in FY 1985 to maintain fiscal effort at the level established in FY 1984, the State shall compute its fiscal effort for FY 1986 on the basis of the fiscal effort for FY 1984.

(Sec. 307; 20 U.S.C. 1206)

§ 426.45 What are a State's responsibilities regarding State advisory councils and what are the functions of these councils?

(a) A State may use funds received under section 304 of the Act to support a State advisory council.

(b) The State shall determine the membership, method of appointment, manner of operation, and necessary support services of a State advisory council.

(c) The functions of a State advisory council are to assist the SEA to plan, implement, or evaluate programs or activities assisted under the Act.

(Sec. 311; 20 U.S.C. 1206b)

§§ 426.46–426.49 [Reserved]

3. Part 431 is revised to read as follows:

PART 431—NATIONAL ADULT EDUCATION DISCRETIONARY PROGRAM

Subpart A—General

Sec.

431.1 What is the National Adult Education Discretionary Program?

431.2 Who is eligible to apply for an award under the National Adult Education Discretionary Program?

431.3 What regulations apply to this program?

431.4 What definitions apply to this program?

431.5–431.9 [Reserved]

Subpart B—What Kinds of Activities Does the Secretary Assist Under This Program?

431.10 What types of projects may be funded?

431.11 How does the Secretary establish priorities for this program?

431.12–431.19 [Reserved]

Subpart C—[Reserved]

431.20–431.29 [Reserved]

Subpart D—How Does the Secretary Make an Award?

431.30 How does the Secretary evaluate an application?

431.31 What selection criteria does the Secretary use?

431.32 How does the Secretary select an application for funding?

431.33–431.39 [Reserved]

Subpart E—What Condition Must Be Met by a Recipient?

431.40 What condition must be met under this program?

431.41–431.49 [Reserved]

Authority: Sec. 309 of the Adult Education Act, as amended by Pub. L. 98-511; 20 U.S.C. 1207a, unless otherwise noted.

Subpart A—General

§ 431.1 What is the National Adult Education Discretionary Program?

The National Adult Education Discretionary Program supports projects that contribute to the improvement and expansion of adult education.

(Sec. 309(a)(1); 20 U.S.C. 1207a(a)(1))

§ 431.2 Who is eligible to apply for an award under the National Adult Education Discretionary Program?

The following are eligible to apply for grants, contracts, or cooperative agreements under this program:

- (a) Public and private institutions, agencies, and organizations.
- (b) Individuals.
- (c) Business concerns.

(Sec. 309(a)(2); 20 U.S.C. 1207a(a)(2))

§ 431.3 What regulations apply to this program?

The following regulations apply to the National Adult Education Discretionary Program:

- (a) The regulations in 34 CFR Part 425.
- (b) The regulations in this part.

(20 U.S.C. 1201 *et seq.*)

§ 431.4 What definitions apply to this program?

The definitions in 34 CFR 425.3 apply to this program.

(20 U.S.C. 1201 *et seq.*)

§§ 431.5–431.9 [Reserved]

Subpart B—What Kinds of Activities Does the Secretary Assist Under This Program?

§ 431.10 What types of projects may be funded?

(a) The Secretary directly or through grants, contracts, or cooperative agreements supports projects for the improvement and expansion of adult education. Funds may be used for—

- (1) Applied research;
- (2) Development;
- (3) Demonstration;
- (4) Dissemination;
- (5) Evaluation; and
- (6) Related activities.

(b) Projects may include, but are not limited to—

- (1) Improving adult education opportunities for elderly individuals and adult immigrants;
- (2) Evaluating educational technology and computer software suitable for providing instruction to adults; and
- (3) Supporting exemplary cooperative adult education programs that combine the resources of businesses, schools, and community organizations.

(Sec. 309(a)(1); 20 U.S.C. 1207a(a)(1))

§ 431.11 How does the Secretary establish priorities for this program?

(a) The Secretary announces, through one or more notices published in the *Federal Register*, the priorities for this program, if any, from the topics described in § 431.10, and the manner in which those priorities will be implemented.

(b) The Secretary may establish a separate competition for one or more of the priorities selected. If a separate competition is established for one or more priorities, the Secretary may reserve all applications that relate to those priorities for review as part of the separate competition.

(20 U.S.C. 1201 *et seq.*)

§§ 431.12–431.19 [Reserved]

Subpart C—[Reserved]

§§ 431.20–431.29 [Reserved]

Subpart D—How Does the Secretary Make an Award?

§ 431.30 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application for a grant or cooperative agreement on the basis of the criteria in § 431.31.

(b) The Secretary may award up to 100 points, including a reserved 15 points to be distributed in accordance with paragraph (d) of this section, based on the criteria in § 431.31.

(c) Subject to paragraph (d) of this section, the maximum possible points for each criterion are indicated in parentheses after the heading for each criterion.

(d) For each competition, as announced through a notice published in the *Federal Register*, the Secretary may assign the reserved points among the criteria in § 431.31.

(20 U.S.C. 1201 *et seq.*)

§ 431.31 What selection criteria does the Secretary use?

The Secretary uses the following criteria in evaluating each application:

(a) *Plan of operation.* (20 points)
(1) The Secretary reviews each application for information that shows the quality of the plan of operation for the project.

(2) The Secretary looks for information that shows—

- (i) High quality in the design of the project;
- (ii) An effective plan of management that ensures proper and efficient administration of the project;
- (iii) A clear description of how the objectives of the project relate to the purpose of the program;

(iv) The way the application plans to use its resources and personnel to achieve each objective;

(v) A clear description of how the applicant will provide equal access and treatment for eligible project participants who are members of groups that have been traditionally underrepresented, such as—

- (A) Members of racial or ethnic minority groups;
- (B) Women;
- (C) Handicapped persons; and
- (D) The elderly.

(b) *Quality of key personnel.* (15 points)

(1) The Secretary reviews each application for information that shows the qualifications of the key personnel the applicant plans to use on the project.

(2) The Secretary looks for information that shows—

(i) The qualifications of the project director (if one is to be used);

(ii) The qualifications of each of the other key personnel to be used in the project;

(iii) The time each person referred to in paragraphs (b)(2) (i) and (ii) of this section will commit to the project; and

(iv) The extent to which the applicant, as part of its nondiscriminatory employment practices, encourages applications for employment from persons who are members of groups that have been traditionally underrepresented, such as—

(A) Member of racial or ethnic minority groups;

(B) Women;

(C) Handicapped persons; and

(D) The elderly.

(3) To determine personnel qualifications, the Secretary considers experience and training, in fields related to the objectives of the subject, as well as other information that the applicant provides.

(c) *Budget and cost effectiveness.* (10 points)

(1) The Secretary reviews each application for information that shows that the project has an adequate budget and is cost effective.

(2) The Secretary looks for information that shows—

(i) The budget for the project is adequate to support the project activities; and

(ii) Costs are reasonable in relation to the objectives of the project.

(d) *Evaluation plan.* (5 points)

(1) The Secretary reviews each application for information that shows the quality of the evaluation plan for the project.

Cross Reference. See 34 CFR 75.590 (Evaluation by grantee).

(2) The Secretary looks for information that shows methods of evaluation that are appropriate for the project and, to the extent possible, are objective and produce data that are quantifiable.

(e) *Adequacy of resources.* (5 points)

(1) The Secretary reviews each application for information that shows that the applicant plans to devote adequate resources to the project.

(2) The Secretary looks for information that shows—

(i) The facilities that the applicant plans to use are adequate; and

(ii) The equipment and supplies that the applicant plans to use are adequate.

(f) *National need.* (20 points)

(1) The Secretary reviews each application to determine how it addresses a national need in adult education.

(2) The Secretary looks for information that describes—

(i) The need in terms of the problem rather than the symptom of the problem;

(ii) Who or what will be helped by the project;

(iii) How the project will improve and expand adult education; and

(iv) The extent to which the project involves creative or innovative techniques and concepts.

(g) *Dissemination plan.* (10 points)

(1) The Secretary reviews each application for information that shows the quality of the dissemination plan for the project.

(2) The Secretary looks for information that shows—

(i) The extent to which the project is designed to yield outcomes that can be readily disseminated;

(ii) A clear description of the project outcomes; and

(iii) A detailed description of how information and materials will be disseminated.

(Sec. 309; 20 U.S.C. 1207a)

§ 431.32 How does the Secretary select an application for funding?

(a) After evaluating the applications according to the criteria contained in § 431.31, the Secretary may determine whether the most highly rated applications are broadly and equitably distributed throughout the Nation.

(b) The Secretary may select other applications for funding on the basis of geographic distribution if doing so would contribute to achieving the purposes of this discretionary program.

(c) The Secretary may decline to fund any project that is eligible for funding under a different competition of Department of Education program.

(Sec. 309; 20 U.S.C. 1207a)

§§ 431.33–431.39 [Reserved]

Subpart E—What Condition Must Be Met by a Recipient?

§ 431.40 What condition must be met under this program?

A recipient shall not charge participants for their participation in the projects assisted under this program.

(Sec. 309(a)(2); (20 U.S.C. 1207a(a)(2))

§§ 431.41–431.49 [Reserved]

4. Part 432 is removed.

PART 432—ADULT EDUCATION PROGRAMS FOR IMMIGRANTS AND INDOCHINA REFUGEES—[REMOVED]

Appendix—Summary of Comments and Responses

Note.—This Appendix will not be codified in the Code of Federal Regulations.

The following is a summary of the comments, suggestions, and recommendations received on the notice of proposed rulemaking for the Adult Education General Provisions, the State-administered Adult Education Program, and the National Adult Education Discretionary Program published on February 28, 1985. Each comment is followed by a response that indicates a change has been made or why no change is considered necessary. Specific comments are arranged in order of the sections of the final regulations to which they pertain.

§ 425.3 Program definition—Limited English proficiency.

Comment. Two commenters urged that the definition of "limited English proficiency" be taken verbatim from title VII of the Elementary and Secondary Education Act of 1965 (ESEA), as required by section 306(b)(11) of the Act.

Response. A change has been made. The definition of "limited English proficiency" from title VII of ESEA, as amended, is added in § 425.3. The Secretary agrees that this definition relates to a particular subset of that population with limited English language skills and is required for inclusion by section 306(b)(11) of the Act. However, since "limited English language skills" is also referenced in the Act and the regulations and defines a broader population than those included under the definition of "limited English proficiency," a definition of this term is retained in the final regulations.

§ 425.3 Program definition—Community school programs.

Comment. Two commenters suggested that the term "community school programs" be defined in the regulations.

Response. A change has been made. The term "community school program," as defined in section 303(e) of the Act, is included in § 425.3.

§ 425.10 Program activities.

Comment. One commenter took exception to the authorized program activities. With reference to acquiring basic literacy skills, the commenter questioned whether this activity takes into account cost-effectiveness of funding programs that are needed

because of the ineffectiveness of earlier compulsory education programs. The commenter viewed the activities relating to enabling adults to become more employable, productive, and responsible citizens as too broad in scope and lacking in definition.

Response. No substantive change has been made. Section 302 of the Act states the purpose of and the activities to be supported by the adult education program. The format of § 425.10 now explicitly reflects the language of section 302 of the Act.

§ 426.11(b)(2) Tuition and fees.

Comment. A number of commenters addressed the prohibition on charging tuition, fees, or other charges for adults enrolled in adult basic education. Over three-fourths of these commenters concurred in retaining this prohibition. Another commenter suggested the allowance of a modest contribution by the adult basic education participant with assistance from other agencies or individual scholarships for the more economically disadvantaged. A few commenters viewed eliminating the prohibition as a guarantee of adequate interest and a means of building a better self image for adult participants. One commenter suggested sliding scales for adult basic education participants and allowing charges for materials. It was asserted this would give participants ownership of their books and also help relieve the fiscal constraint on some programs. A few commenters advocated eliminating the entire regulatory provision and leaving the decision on all charges to the discretion of individual State educational agencies.

While the proposed regulations did not address charges for adult secondary education, three commenters suggested that individual State educational agencies be allowed flexibility in creating procedures for charges to participants at this instructional level.

Response. No change has been made. The prohibition on charging tuition and fees for adult basic education participants has been in effect since late in the 1960's. The adult education program emphasis has been and continues to be on serving educationally disadvantaged adults. These adult participants are the ones least likely to have financial resources available for these charges.

The prohibition does not apply to adult secondary education participants. A State educational agency is permitted discretion in making charges for adult secondary education participants.

The Secretary believes that modest tuition or fee charges for this population

will not discourage participation in the adult secondary education program.

§ 426.11(b)(9) Final reports of 310 projects.

Comment. One commenter requested retention of the requirement in the 1980 regulations that the results of State-administered special experimental demonstration projects and teacher training projects be sent to the adult education information clearinghouse.

Response. No change has been made. The Education Amendments of 1984 eliminated the requirement for an adult education information clearinghouse; consequently, no such dissemination requirement can be retained in the regulations.

§ 426.11(b) (5) and (9) and § 426.33 Funds for section 310 projects.

Comment. One commenter called for the repeal of the legislative authority for special experimental demonstration projects and teacher training projects. Another commenter recommended that a percentage range of expenditures, from 5 to 10 percent, be established to allow more flexibility to the State educational agency.

Response. No change has been made. Section 310 of the Act requires that each State expend not less than 10 percent of its allotment for each fiscal year for special experimental demonstration projects and teacher training projects. The statutory authority is specific and may not be changed by regulation. A State educational agency is allowed flexibility to determine any maximum limit.

§ 426.11(b)(6) Assistance to persons with limited English proficiency.

Comment. A commenter questioned the absence of any limitation on expenditures for special assistance to meet the needs of persons with limited English proficiency. That commenter believed assistance for this special population should carry an expenditure limitation as do programs in adult secondary education, programs for institutionalized adults, and section 310 projects.

Response. No change has been made. The program assurance relating to assistance to persons with limited English proficiency is required by section 306(b)(11) of the Act which contains no expenditure limitation. The Secretary, through the regulatory process, has no authority to establish an expenditure limitation on this activity.

Additionally, a State educational agency, in its three-year State plan, must show the needs, goals, and activities for persons with limited English proficiency,

including adult immigrants. The Secretary believes that a State educational agency should have the flexibility to determine the appropriate services to meet the educational needs of this population.

§ 426.11(b)(8) Data collection.

Comment. One commenter recommended that the data collection requirement include an assurance to the Secretary that private entities are participating in the program.

Response. No change has been made. Public and private entity participation is assured to the Secretary through requirements in § 426.12 (a), (i), and (1).

Comment. Regarding the program assurance on data collection, two commenters stated that the specific language of the statute should be followed in the regulations.

Response. A change has been made. The program assurance in § 426.11(b)(8) has been changed to reflect the requirements of section 306(b)(14) of the Act.

§ 426.12 (a) and (i) Clarification of terms.

Comment. Two commenters suggested that terms relating to employment and training be made more consistent with the language contained in the Job Training Partnership Act and the Carl D. Perkins Vocational Education Act.

Response. Changes have been made. The Secretary agrees that the terms should be consistent among related legislative authorities. Accordingly, in listing the entities to be involved in developing and carrying out the State plan in § 426.12(a)(10), the term "State manpower and training agencies" has been changed to *State employment and training agencies*. Likewise, in § 426.12(a)(11), the term "Local manpower and training agencies" has been changed to *Local employment and training agencies*.

An additional change for consistency appears in § 426.12(i)(1). The term "State manpower service councils" has been changed to *State job training coordinating councils*.

§ 426.12(a) Representation in developing and carrying out the State plan.

Comment. One commenter expressed concern about the prescriptiveness of the regulations in the listing of agencies and groups required to be involved in developing and carrying out the State plan. The commenter suggested that a representative sampling of these agencies and groups would suffice, thus allowing flexibility to a State to involve

those key agencies and groups that are unique to a particular State.

Another commenter supported this mechanism for ensuring involvement of nonpublic entities interested in adult education as a means of broadening the scope of the program.

Response. No change has been made. Section 306(b)(8) of the Act specifies fifteen agencies and groups to be involved in developing and carrying out the State plan. The Act also provides a general category of "other entities in the State concerned with adult education." The regulations contain this category, along with some examples of these "other entities," as the sixteenth agency and group. A State educational agency, of course, has the discretion to include additional entities as appropriate in its participatory planning process.

§ 426.12(h) Outreach activities.

Commenter. Two commenters questioned the advisability of stipulating that a State shall make a concerted effort to provide transportation and child care services through other programs, agencies, and organizations.

Response. A change has been made. A State is required, by § 426.12(h), to include in its three-year plan a description of its outreach activities, including efforts to assist adult participation in adult education programs. The regulations allow a State the option of using program funds for activities in conjunction with support services, such as child care. The permissible use of other programs or entities for support services is intended to allow maximum funding for programs to serve the needs of educationally disadvantaged adults. The stipulation that a concerted effort be made to obtain these services through other than adult education resources was included in the 1980 regulations. The Secretary agrees with the commenters that the statement may be misinterpreted by a State so as to discourage or preclude the expenditure of any funds under the Act for such support services as transportation and child care. Consequently, the statement stipulating that States make a concerted effort to obtain these services through other programs, agencies, and organizations has been deleted from the regulations.

§ 426.12(c) and (g) Addressing the educational needs of all segments of the adult population in a State.

Comment. One commenter, while agreeing with Department policy not to exceed statutory language in regulations, suggested that program participation of disabled persons be

highlighted in the preamble of these regulations. Another commenter called for specificity in addressing migrant farmworkers as a segment of the adult population in need of educational services.

Response. No change has been made. Section 306(b) (1) and (4) of the Act requires a State to identify the needs and to set forth a program with respect to the needs of *all* segments of the adult population in the State, including residents of rural areas, residents of urban areas with high rates of unemployment, adults with limited English language skills, and institutionalized adults. In addition, section 306(b)(12) of the Act requires that the special needs of adult immigrants be addressed and section 306(b)(9) of the Act requires outreach activities to assist participation, including adequate transportation. These provisions should assure the participation of disabled persons and migrant farm workers as part of the adult population of a State.

§ 426.12(i)(1) Public and private entities.

Comment. One commenter suggested that in § 426.12(i)(1) the phrase "other agencies, organizations, and institutions in the State which operate employment . . ." be changed to read *other public and private agencies, organizations, and institutions in the State which operate employment . . .*

Response. No change has been made. The current phrase reflects the statutory language and includes both public and private entities which are made eligible under section 304(a)(1)(A) of the Act.

§ 426.12(j) Local application process.

Comment. A number of commenters recommended retention of the competitive local application process as required by the 1980 regulations. A lesser number of commenters recommended the elimination of the competitive local application process.

Response. No change has been made. Section 304(a) of the Act establishes local educational agencies and public or private agencies, organizations, and institutions as categories of eligible applicants to a State educational agency for financial assistance to conduct adult education programs. A State educational agency may not give preferential status to or exclude any category of eligible applicant, unless it is prohibited by State law from awarding Federal funds to a category of eligible applicants. The regulations in § 426.12(j) require that a State educational agency in its three-year State plan describe "the local application process and the criteria for

evaluating local applications submitted by all eligible applicants for subgrants or contracts." This will ensure an open competition and equal opportunity for all eligible applicants.

§ 426.12(j) State-established criteria for evaluating local applications.

Comment. A number of commenters recommended retaining the factors for evaluating applications, as enumerated in the 1980 regulations for the adult education program. One commenter recommended that the factors be made more selective. Another commenter recommended suggesting certain criteria in the regulations, rather than requiring specific criteria.

A lesser number of commenters recommended deletion of the factors for evaluating applications to allow more flexibility to a State educational agency. One commenter saw no clear need to delete the factors nor any inherent problem in deleting them.

Response. No change from the NPRM has been made. The 1980 regulations for the adult education program contained factors that a State educational agency was required to consider in developing objective criteria for evaluating local applications. In developing these new regulations, the Secretary deleted those provisions because it is the policy of the Secretary not to promulgate regulations or to delimit State discretion when not required to do so by the law. However, the Secretary encourages State educational agencies to develop objective criteria for evaluating local applications to ensure quality instructional services, fiscal accountability, and access for educationally disadvantaged adults.

§ 426.12(l) Expansion of the delivery system.

Comment. The provision that generated the most public comment was the definition of expansion of the delivery of adult education services. All commenters recommended modifications of the 1980 provisions. A number of commenters expressed concern that expansion should not be measured purely by quantitative means particularly in view of the fact that funding limitations sometimes act to preclude program expansion in terms of enrollment increases. Quality factors as well as quantity factors were suggested for inclusion in the concept of expansion. Suggested modifications included making the definition less burdensome administratively; providing optional ways of measuring expansion; measuring involvement with additional public and private providers in planning,

delivery, and evaluation; and measuring an increased use of volunteers and literacy volunteer programs. One commenter suggested that measures of expansion be enlarged to include adoption of improved instructional techniques, use of new technologies, or new agency coordination. One commenter suggested that an expansion of geographic areas in which adult education services are provided should be a measure.

Response. No change has been made. The final regulations retain the language of the proposed regulations in requiring a description of the efforts to increase the number of participating agencies, institutions, and organizations other than the public school systems and the number of participants in adult basic education. This language is intended to allow a State educational agency to document its efforts to expand rather than reporting the end results of its efforts. It is clear that the legislation does charge a State with the responsibility to make an effort to expand the delivery system and to document those efforts in the State plan. However, the Secretary recognizes that the best efforts may not always result in quantifiable increases in agencies and participants because of uncontrollable factors.

§ 426.12(m) Prohibition by State law.

Comment. One commenter suggested that a State having a legal prohibition against awarding Federal funds by grant or contract to private agencies receive a decrease in its Federal allotment for the adult education program.

Response. No change has been made. The Secretary has no authority to withhold Federal funds from a State if by State law that State is prohibited from awarding Federal funds to public or private agencies, organizations, or institutions, other than local educational agencies. The regulations, do, however, in § 426.12(m), require a State educational agency to describe in its State plan (1) the legal basis of this prohibition and (2) how public or private agencies, organizations, or institutions will be used for expanding the delivery of services.

Comment. One commenter suggested that the phrase "public or private agencies" in § 426.12(m)(2) be changed to read *public and private agencies*.

Response. No change has been made. The phrase "public or private agencies" reflects the requirements of section 304(a)(1) of the Act.

§ 426.12(n) Criteria for awarding special projects and teacher training projects under section 310 of the Act.

Comment. A number of commenters gave views on whether the Secretary should publish national priorities for a State educational agency to consider in establishing criteria for the approval of section 310 projects. Commenters were evenly divided on this issue. Commenters who favored the published national priorities saw them as providing good, broad-based guidance. The opposing viewpoint was that Section 310 efforts should be directed more toward needs that are unique to regions within State boundaries.

Response. No change has been made. The Secretary chooses not to regulate in this instance, thus affording a State more flexibility to address its own special interests, needs, and concerns in section 310 projects.

§ 426.12(o) Evaluation of activities under sections 306 and 310 of the Act.

Comment. One commenter advocated more frequent evaluations to ensure managerial and programmatic effectiveness in the adult education program. Another commenter called for clarification of the evaluation requirement.

Response. A change has been made. Section 426.12(o) of the proposed regulations has been deleted from these final regulations because the applicable State evaluation requirements for the Act are set forth in 34 CFR 76.101(e)(4).

The single State application required by section 435(b) of the General Education Provisions Act contains an assurance that a State will evaluate the effectiveness of covered programs in meeting its statutory objectives, at such intervals (at least once every three years), and in accordance with such procedures as the Secretary may prescribe by regulation. While more frequent evaluations may not be required, a State, of course, has the option of performing evaluations annually if it so desires.

By submitting a single State application, an SEA gives assurance that it will evaluate the effectiveness of section 306 and section 310 programs under the Act.

§ 426.21 State administrative costs.

Comment. A majority of the commenters agreed that the regulations should not establish a limitation on administrative costs at the State level. Those commenters believe that a State should be given authority to determine appropriate administrative costs. Other commenters suggested percentage

limitations: the limitation under the 1980 regulations of five percent; a five to ten percent limitation; five percent of the State's total allocation or \$65,000 limitation, whichever is greater; and negotiated costs based on administrative goals and objectives submitted in the three-year State plan.

Response. No change has been made. The 1980 regulations for the adult education program limited State administrative costs to five percent. The amended legislation retains the requirement, in section 306(b)(2), that a State plan provide for the administration of the program by the State educational agency. However, the amended legislation is silent on a separate authorization for, or a maximum limitation on, administrative costs. Accordingly, the Secretary has no legal authority for stipulating or suggesting a limitation. However, the Secretary believes that administrative costs should be held to a minimum so as to allow maximum funding for programs to serve the needs of educationally disadvantaged adults. Also, the cost principles in Appendix C of 34 CFR Part 74 impose a "necessary and reasonable" standard.

State educational agencies should note that § 426.12(f) of the regulations requires that the State set forth in its three-year State plan a description of the planned use of Federal funds for the administration of the program, including any planned expenditures for a State advisory council.

Comment. One commenter pointed out that the provision in § 426.21 that stipulates that "allowable administrative costs must be necessary and reasonable for proper and efficient administration of the program" is also set forth in Appendix C to 34 CFR Part 74.

Response. A change has been made. The language has been deleted from the final regulations. It is Department policy not to repeat requirements set forth in the Education Department General Administrative Regulations in other regulations.

§ 426.21 Local administrative costs.

Comment. While a majority of the commenters did not support a regulatory limitation on State administrative costs, the commenters were unanimous in their desire to allow a State flexibility in determining or limiting local administrative costs. The commenters recommended that no regulatory guidance on determining or limiting local administrative costs be provided.

Response. No change has been made. Except with respect to the "necessary

and reasonable" cost principles, the Secretary has no authority to prescribe or limit local administrative costs. The regulations give a State the flexibility to determine allowable local administrative costs.

§ 426.30 Eligible applicants.

Comment. A number of commenters expressed concurrence with the elimination from the regulations of the authority to fund individuals under section 310 of the Act. A lesser number of commenters called for retention of the authority to fund individuals.

Response. No change has been made. Section 304(a)(1) of the Act provides that local educational agencies and public or private agencies, organizations, and institutions are eligible applicants for funds. Since the statute does not separately address eligible applicants for section 310 projects, these same categories of applicants are eligible for all components of the State-administered adult education program.

Previous program regulations permitted individuals to apply unless precluded by State law. Individuals are now excluded as eligible applicants for section 310 projects. A State educational agency, of course, has the authority to act directly and in doing so may issue personal service contracts to obtain products or services. Likewise, other recipients under section 310 may issue personal service contracts to obtain products or services.

Comment. One commenter suggested that the phrase "public or private agencies" in § 426.30(a) be changed to read *public and private agencies*.

Response. No change has been made. The current phrase reflects statutory requirements.

§ 426.30 Public notice of availability of funds.

Comment. One commenter recommended that the regulations prescribe the means of notifying public and private agencies, organizations, and institutions of the availability of funds. The commenter suggested a requirement that notices be posted in all public libraries and advertised in major daily newspapers in the State.

Response. No change has been made. A State educational agency is required by § 426.30(b)(2) to give sufficient public notice of the availability of Federal and State funds to public and private agencies, organizations, and institutions. The Secretary does not believe that a more prescriptive notification process is warranted. A State educational agency may choose to use public libraries, newspapers, or other means that ensure

equitable and appropriate public notice to public and private agencies, organizations, and institutions. To notify local educational agencies, a State educational agency is required by § 426.30(b)(1) to provide the notice directly.

§ 426.31 State distribution of funds.

Comment. One commenter recommended that a minimum of one-third of the funds distributed by a State be awarded to private agencies, organizations, or institutions.

Response. No change has been made. The Secretary has no authority to establish any minimum or maximum allotment level for any category of eligible recipient. Open competition and equal opportunity must be afforded to all eligible applicants.

§ 426.31 Multi-year grants or contracts.

Comment. A number of commenters suggested that a State educational agency be authorized to award multi-year grants or contracts. A few commenters opposed this discretion. One commenter suggested a three-year period for instructional programs, two years for section 310 projects. Another commenter suggested that safeguards be included in the multi-year process to ensure that changing demographics in the population and emerging priorities are served.

Response. No change has been made. Unlike the 1980 regulations, these regulations do not require an annual review of applications from eligible applicants and single-year awards. A State educational agency may continue to employ an annual application review and funding process, or it may employ a multi-year review and funding process.

§ 426.32 For-profit providers of services.

Comment. A majority of the commenters found the statutory and regulatory language adequate with respect to for-profit providers and services. One commenter was critical of the provision making for-profit providers of services eligible for funding. The commenter expressed concern that for-profit providers may seriously weaken efforts to ensure quality control and professionalization in the adult education field.

Response. No change has been made. Under section 304(a)(2) of the Act, for-profit agencies, organizations, and institutions are eligible applicants. The law provides that for-profit entities must meet two tests not explicitly required of other applicants. These are (1) that the applicant can make a significant contribution to attaining the objectives

of the Act and (2) either can provide substantially equivalent education at a lesser cost or can provide services and equipment not available in public institutions. The Secretary agrees with the commenters that a State educational agency should have the flexibility to develop its own procedures for determining these qualitative judgments and cost comparisons.

§ 426.32(b) Consultation by applicable local educational agency.

Comment. One commenter opposed the involvement by the applicable local educational agency in the review of applications by public or private agencies, organizations, and institutions. The commenter expressed doubt as to whether a local educational agency has an understanding of the problem or solutions superior to that of other eligible applicants.

Response. No change has been made. Section 304(a)(1) of the Act clearly requires consultation between the applicable local educational agency and other public or private eligible applicants prior to funding by a State. In addition to consultation, the Act further provides the applicable local educational agency the opportunity to comment on applications from these other categories of eligible applicants. This statutory requirement may not be changed by regulation.

The purpose of consultation is to reduce duplication of effort and provide for the best possible delivery of services to educationally disadvantaged adults. Consultation will enable different points of view and understanding to be considered in an organized way. The initiative for seeking consultation is the responsibility of the public or private agency. The local educational agency does not have the authority to certify, approve, or veto an application from an applicant. Nor can the local educational agency jeopardize the agency's application through inaction of the request for consultation. If a local educational agency delays in commenting on an agency's application, a State may still consider the application for funding if there is written evidence that consultation was requested in a timely manner.

Comment. One commenter objected to the requirement in § 426.32(b)(2) that an applicant other than a local educational agency must provide the applicable local educational agency the opportunity to comment on the application prior to submitting it to the State. The commenter pointed out that while section 304(a)(1) of the Act does require that the opportunity to comment must

take place prior to approval of an application by the State educational agency, the Act does not require that the opportunity to comment must take place prior to submission of the application to the State.

Response. A change has been made. The Secretary agrees with the commenter and the phrase "prior to submitting it to the State" has been deleted from § 426.32(b)(2).

§ 426.32 Local applications.

Comment. One commenter suggested that regulatory language be added in § 426.32 to require local applicants to describe the cooperative arrangements that have been made to deliver services to participants of the adult education program.

Response. No change has been made. Section 426.32 refers specifically to requirements for non-local educational agency applicants. The Secretary believes that assurance of consultation, cooperation, and coordination by both the State educational agency and by local providers of adult education services is adequately covered in § 426.12 (i) and (m).

§§ 426.41-426.44 Maintenance of effort.

Comment. One commenter strongly opposed the maintenance of effort requirement of the program on the basis that it would have the effect of punishing success. The commenter pointed out that as adult education programs achieve success State expenditures would be reduced in proportion to the decreased need for programs. In turn, the Federal contribution to the State would decrease.

Response. No change has been made. The statutory authority requiring maintenance of effort is specific and may not be changed by regulation.

Comment. One commenter suggested other situations that might result in less revenue to State governments and thereby constitute exceptional or uncontrollable circumstances warranting a waiver of the maintenance of effort requirement.

Response. No change has been made. Section 307(b)(2) of the Act cites examples of exceptional or uncontrollable circumstances "such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State educational agency." The language in § 426.43(b) is offered for guidance and is not intended to be an all-inclusive list of situations denoting exceptional or uncontrollable circumstances.

Comment. Due to the long-range effect on State governments of certain declines

in financial resources, one commenter believed that the one-year waiver provision is too restrictive.

Response. No change has been made. The regulatory language conforms to that in the Act and provides for a one-year waiver from the maintenance of effort requirement.

§ 431.2 Eligible applicants.

Comment. One commenter suggested that private nonprofit entities be eligible to apply under the National Adult Education Discretionary Program.

Response. No change has been made. Both the statute and the regulations cite public and private institutions, agencies, and organization among the eligible applicants under the National Adult Education Discretionary Program. That category of eligible applicants includes both nonprofit and for-profit entities.

§ 431.10 Program activities under the National Discretionary Program.

Comment. One commenter objected to a basic goal of the National Discretionary Program. That objectionable goal is to support projects that contribute to the expansion of adult education. Rather, the commenter suggested that the goal should be to reduce the need for adult education by having successful educational programs for all age levels. The commenter also took exception to the examples of projects that may be funded. In particular, the commenter believed that elderly individuals should not be singled out as a group more worthy of this program than any other group. The commenter suggested that activities relating to educational technology and computer software should not be open-ended but should be directly related to meeting the needs of educationally disadvantaged adults.

Response. No change has been made. The regulations reflect the statutory requirements as set forth in section 309(a)(1) of the Act. It should be noted that the project examples relating to elderly individuals and adult immigrants, educational technology and computer software, and cooperative adult education programs are intended to be illustrative only and are not required by statute or regulations.

§ 431.31(g) Dissemination plan.

Comment. One commenter recommended that information and materials developed under national projects be disseminated to any parties concerned about illiteracy and other adult education problems, not solely to educators.

Response. A change has been made. The Secretary agrees, and the phrase "to

educators" has been deleted in § 431.31(g)(2)(iii).

§ 431.40 Charges to participants.

Comment. One commenter suggested an amendment to the Act to allow charges to those participants who can afford to pay. The commenter further suggested that collected funds be reverted to the State program or placed in reserve for future funding needs.

Response. No change has been made. Section 309(a)(2)(B) of the Act is specific in the prohibition of charges to participants in projects conducted by any private for-profit institution, agency, organization, individual, or business concern. Further, the Secretary, based on legislative history, believes the Congress intended that no such charges shall be made to participants regardless of the entity conducting the program.

General Comments

Comment. Some commenters recommended that the greatest amount of latitude possible for program operations should be allowed to States. Commenters suggested that the diversity of conditions and populations throughout the country preclude establishing a set of prescriptive rules that will have equitable and beneficial application to all. Other commenters supported the efforts made to reduce administrative burden on grantees, to eliminate certain unnecessary regulations, and to clarify existing regulations.

Response. No change has been made. The Secretary believes that these regulations are not intrusive and provide maximum flexibility to State educational agencies, while adhering to requirements and intent of the authorizing legislation.

Comment. One commenter urged that the regulations be modified in a number of instances to involve public broadcasting stations and state public telecommunication agencies in State plan development and in the delivery of services under the Act. The commenter also suggested changes in the regulations that would encourage the use of telecommunications technology in the instructional program.

Response. No change has been made. The Secretary encourages States to utilize the public broadcasting system and its associated technology in carrying out responsibilities under the Act when such involvement and use is appropriate. However, there is no statutory authority for including in the regulations any requirements for such involvement.

Comment. One commenter, while generally supporting the regulations, emphasized the need to include teacher involvement in policy-making matters relative to the implementation of the adult education program.

Response. No change has been made. The Secretary agrees that teachers are the center of the learning environment and contribute immeasurably to programmatic achievements. The Secretary further agrees that States should use the expertise and experience of teachers in any way that is

appropriate. However, the statute contains no authority to regulate teacher involvement.

Comment. A commenter recommended that the regulations should emphasize the importance of life skills toward enabling adults to function in society. The commenter also pointed out that life skill achievements should be among the evaluation criteria as well as the data collection elements. The commenter also spoke on behalf of competency-based adult education.

Response. No change has been made. Instructional content and methodology are determined at the State and local levels. While agreeing that life skills instruction and competency-based instruction may be effective methods in adult education, the Secretary leaves decisions of this nature to the discretion of the individual States. There is no requirement in the legislation to govern either the content or methodology of instruction.

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